A

SUNRISE HOME GOODS (M) SDN BHD v. KETUA PENGARAH KASTAM & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
AHMAD KAMAL MD SHAHID J
[ORIGINATING SUMMONS NO: WA-24-73-12-2022]
2 JANUARY 2024

B

Abstract – *The Customs Department may not impose on a licensed warehouse and licensed manufacturing warehouse licensees anti-dumping duties when the relevant legislations have already provided that the same licensees are suspended/exempted from such. This is especially when the Parliament, through its Hansard, has stated the suspension/exemption of anti-dumping duties is for the purpose of incentivising and encouraging export-oriented industries.*

C

D

CUSTOMS AND EXCISE: *Customs duties – Customs Department ('Customs') issued bill of demand to licensed warehouse ('LW') and licensed manufacturing warehouse ('LMW') licensees claiming for underpaid anti-dumping duties – LW and LMW licensee's appeal to Customs Appeal Tribunal dismissed – Whether tribunal erred in law in holding LW and LMW licensees could be imposed with anti-dumping duties – Whether decision in accordance with intention of Parliament – Whether Customs empowered to impose anti-dumping duties to LW and LMW licensees – Whether decision to impose anti-dumping duties communicated by Customs to LW and LMW licensees*

E

F

CIVIL PROCEDURE: *Appeal – Appeal against decision of quasi-judicial body – Customs Department ('Customs') issued bill of demand to licensed warehouse ('LW') and licensed manufacturing warehouse ('LMW') licensees claiming for underpaid anti-dumping duties – LW and LMW licensee's appeal to Customs Appeal Tribunal dismissed – Whether tribunal erred in law in holding LW and LMW licensees could be imposed with anti-dumping duties – Whether decision in accordance with intention of Parliament – Whether Customs empowered to impose anti-dumping duties to LW and LMW licensees – Whether decision to impose anti-dumping duties communicated by Customs to LW and LMW licensees*

G

H

The appellant was a company whose principal business was to manufacture kitchen sinks solely for export, mainly in the United States. The first and second respondents, respectively, were the Director General of Customs Department and the Customs Appeal Tribunal. To manufacture the kitchen sinks, the appellant would import, among others, stainless-steel plates produced in Guangdong, China. Upon arrival of these stainless-steel plates, the appellant would deposit the same to its licensed (*ie*, bonded) warehouse ('LW') under s. 65 of the Customs Act 1967 ('Customs Act') or licensed

I

(*ie*, bonded) manufacturing warehouse ('LMW') under s. 65A of the Customs Act. As such, the appellant was LW and LMW licensees and, under s. 65(1) of the Customs Act, the appellant was entitled to suspension/exemption on customs duties, which as per s. 2(1) of the Customs Act, also included anti-dumping duties, for these imported stainless-steel plates. Accordingly, the appellant did not pay any anti-dumping duties to the Customs Department ('Customs'). However, on certain dates, the Customs conducted an audit on the appellant and found out that the appellant had underpaid its anti-dumping duties at the rate of 23.95% for the importation of the stainless-steel plates pursuant to the Countervailing and Anti-Dumping Duties Act 1993 ('Anti-Dumping Duties Act') and the Schedule to the Customs (Anti-Dumping Duties) Order 2018 ('Anti-Dumping Duties Order'). Subsequently, the Customs issued a bill of demand ('BOD') to the appellant claiming for the anti-dumping duties amounting to RM1,178,075.63. Aggrieved, the appellant filed an appeal to the second respondent. This appeal was dismissed by the second respondent, hence, the present appeal to this court against the second respondent's decision. The issues raised by the appellant in support of the present appeal were, (i) whether the second respondent had committed errors of law by: (a) failing to apply the Court of Appeal's decision, *Seruntun Maju Sdn Bhd v. Pengarah Kastam Negeri Perak Jabatan Kastam Diraja Malaysia & Anor* ('*Seruntun Maju*'), which held that: (1) the phrase 'specify in the licence' meant that 'to mention explicitly, definitely and certainly in the licence'; and (2) conditions of a licence must be unambiguously particularised and identified in the licence when the licence was granted or issued and no conditions could be imposed afterwards; (b) maintaining that the BOD was issued based on a purported condition imposed on the appellant *via* a Customs' internal letter ('Customs' circular') and a Customs' letter to the Federation of Malaysian Manufacturers ('FMM') ('FMM letter') ('letters') which contended that an LW and LMW licensees did not enjoy exemption for anti-dumping duties ('purported condition'). As shown by the facts, the Customs had argued that the purported condition had been properly communicated to the appellant through the issuance of the FMM letter to the FMM; and (c) failing to interpret ss. 2(1), 65 and 65A of the Customs Act correctly by holding that the appellant must pay the anti-dumping duties as the same did not obtain any exemption pursuant to the Anti-Dumping Duties Act; (ii) the second respondent failed to give any or sufficient consideration that: (a) as LW and LMW licensees, the appellant was entitled to enjoy suspension of all customs duties imposed, which included the anti-dumping duties; (b) Customs was not empowered under the Customs Act or the Anti-Dumping Duties Act to restrict/limit the definition of customs duties; (c) the purported condition had never been specified in the appellant's LW and LMW licenses; (d) the BOD was issued solely based on the Customs' interpretation and/or internal policy in the letters. The letters do not have any force of law and contradicted with the express provisions of the Customs Act and the Anti-Dumping Duties Act; and (e) the letters had never been

issued to the appellant; and (iii) the second respondent failed to decide that the appellant had a legitimate expectation that the case of *Seruntun Maju* and other express provisions would be adhered to and applied by the Customs.

Held (allowing appeal with costs):

(1) Firstly, having read the definition of LW under sub-s. 2(1) of the Customs Act together with the meaning of 'durable goods', the appellant as an LMW licensee was allowed to warehouse dutiable goods without paying the customs duties. Secondly, reg. 50 of the Customs Regulations 1977 and reg. 31(b) of the Customs Regulations 2019 provide that if customs duties had been paid, the taxpayer is no longer allowed to store the stainless-steel plates in its LW. Thirdly, the customs duties suspension was consistent with the: (i) Customs' website on LW which stated that the payment of duty and taxes for dutiable goods warehoused in LW was deferred until the goods were released for home consumption or re-exported; and (ii) the Ministry of Investment, Trade and Industry's (MITI) website on the LMW which stated that raw materials and components warehoused in the LW, used directly in the manufacturing of approved goods, were exempt from customs duty. Fourthly, para. 2(1) and item 85 of the Schedule to the Customs Duties (Exemptions) Order 2017 also state that the LW and LMW licensees enjoyed suspension/exemption from customs duties. Therefore, based on the foregoing, it was clear that the appellant as the LW and LMW licensees, enjoyed suspension/exemption from customs duties, which was extended to anti-dumping duties. (paras 15, 19, 21 & 22-25)

(2) If Parliament had intended to exclude anti-dumping duties from the exemption, it would have amended the definition of 'customs duty' under s. 2(1) of the Customs Act to reflect such intention. As such, the second respondent had made an error in holding that s. 2(1) of the Customs Act was irrelevant in ascertaining whether the stainless-steel plates were suspended/exempted from anti-dumping duties given that: (i) s. 2(1) of the Customs Act clearly defines 'custom duty' to include 'anti-dumping duty by or under the Anti-Dumping Duties Act'; and (ii) the purported condition in the letters were inconsistent with the Parliament's intention of establishing an LMW facility to incentivise and encourage export-oriented industries. Further, it was also the Minister's prerogative to decide the scope of the customs' duties exemption given to LW and LMW licensees, and not the Customs'. Considering that that there was no evidence that the Minister had delegated such power to the Customs under the Delegation of Powers Act 1956, the second respondent had clearly committed an error of law in holding that the Customs could, by way of the Customs' circular, impose a legal condition that could override the statutory exemption given to LW and LMW licensees from anti-dumping duties. (paras 32-35 & 38-39)

(3) The Customs' circular merely contained the Customs' own interpretation of the relevant provisions. It does not purport to impose a 'legal condition' on all LMW companies; the word syarat or conditions appeared nowhere in the letter. The second respondent therefore erred in law by holding that the Customs' circular was a valid legal condition imposed by Customs on the appellant which restricted the same from enjoying anti-dumping duties suspension/exemption. Further, the Customs' circular, which was relied on by the Customs to impose the purported condition, was never issued to the appellant pursuant to any express provision of the Customs Act. Other than that, the FMM letter was an internal guidance to the Customs which had no force of law. The Customs therefore could not rely on the letters to impose the purported condition on the appellant. (paras 41-42, 44 & 47)

(4) The Customs could not by way of Customs' circular/FMM letter create a legal condition, the breach of which would attract a criminal sanction under s. 133(1)(a) of the Customs Act. Any finding to the contrary would create a dangerous implication that the Customs was empowered to play the role of a Legislature and create conditions that would result in penal sanction. Moreover, neither the Customs' circular nor the FMM letter were addressed or sent to the appellant. In fact, the second respondent's finding was inconsistent with the oral evidence given by the Customs' own witness, who testified that she was not sure whether the purported condition had ever been communicated to the appellant. (paras 49 & 51)

(5) As per s. 65A(2) of the Customs Act, the Customs was required to specify the conditions applicable in the licence issued to the appellant and not in a separate document, whether the Customs' circular or FMM letter. Applying *Seruntun Maju*, the purported condition ought to be mentioned explicitly, definitely and certainly in the licence and not through the Customs' circular. In the present appeal, the purported condition was never sent to the appellant but was addressed and circulated to a long list of Customs Departments within the Customs. The appellant only became aware of the Customs' circular for the first time when it received the Customs' notice of assessment which attached the Customs' circular. Due to that, it was wrong for the second respondent to hold the purported condition in the letters had been validly imposed on the appellant, when the appellant was never informed of such purported condition at the time the licenses were issued and could not have any prior knowledge of it. (paras 53-54 & 57-59)

(6) The Customs' disallowance of the appellant's entitlement to suspension/exemption of anti-dumping duties was unreasonable, arbitrary and *ultra vires*. As such, the second respondent's decision was tainted with error of law, irrationality and/or unreasonableness that warranted the court's intervention. The present appeal was allowed with costs of RM1,000 without allocator fee. (paras 63-64 & 67)

Case(s) referred to:

Exxon Chemical (Malaysia) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2005] 4 CLJ 810 CA ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Firgos (M) Sdn Bhd [2014] 8 CLJ 943 HC ***(refd)***

Krishnadas Achutan Nair & Ors. v. Maniyam Sanykano [1997] 1 CLJ 636 FC ***(refd)***

Multi-Purpose Holdings Berhad v. Ketua Pengarah Hasil Dalam Negeri [2006] 1 CLJ 1121 CA ***(refd)***

Palm Oil Research And Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd [2004] 2 CLJ 265 FC ***(refd)***

Positive Vision Labuan Ltd v. Ketua Pengarah Hasil Dalam Negeri & Other Appeals [2017] 9 CLJ 595 FC ***(refd)***

Seruntun Maju Sdn Bhd v. Pengarah Kastam Negeri Perak Jabatan Kastam Diraja Malaysia & Anor [2020] CLJU 925; [2020] 1 LNS 925 CA ***(foll)***

Transocean Drilling Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2022] CLJU 2438; [2022] 1 LNS 2438 HC ***(refd)***

Legislation referred to:

Anti-Dumping Duties Act 1993, ss. 30(5), 34(1)
Customs Act 1967, ss. 2(1), 14(1), 65(1), (2), 65A(1A), (2), 65D(2), 133(1)(a)
Customs Duties (Exemptions) Order 2017, Schedule item 85 para 2(1)
Customs Regulations 1977, reg. 50
Customs Regulations 2019, regs. 31(b), 50
Income Tax Act 1967, ss. 112(1)
Interpretation Acts 1948 and 1967, s. 17A

For the appellant - Nitin Nadkarni, Ivy Ling Yieng Ping & Jay Fong Jia Sheng; M/s Lee Hishammuddin Allen & Gledhill
For the respondents - Nor Jamilah Shuhadah Tohet; SFC

Reported by Syamim Ariffin

JUDGMENT

Ahmad Kamal Md Shahid J:

Introduction

[1] The appellant is appealing against the decision of the second respondent (the Customs Appeal Tribunal) (Tribunal) in respect of Appeal No: MOF.TRK.700-6/1/8 (2021) dated 7 November 2022 which dismissed the appellant's appeal against the decision of the first respondent (Customs) in the form of a bill of demand dated 4 May 2021 in relation to the anti-dumping duties allegedly underpaid by the appellant.

[2] The appellant filed an originating summons (OS) dated 2 December 2022 (encl. 1) primarily seeking the following reliefs:

(i) that this appeal be allowed, whereas the decision of the second respondent (Tribunal) regarding Appeal No. MOF.TRK.700-6/1/8 (2021) dated 7 November 2022 (tribunal decision) be set aside;

(ii) that the decision of the first respondent (Customs) in the form of a bill of demand dated 4 May 2021 in relation to the anti-dumping duties allegedly underpaid by the appellant be set aside;

(iii) that all payments made by the appellant for the said bill of demand dated 4 May 2021 be fully refunded by the Customs to the appellant;

(iv) costs; and

(v) any other and further relief that this Honourable Court deems fit and proper.

[3] After the hearing, I allowed the appellant's OS (encl. 1). Here are the grounds for my decision.

Background Facts

[4] The background facts gathered from the cause papers, affidavit in support and submissions of the parties are largely undisputed and can be summarised as follows:

(i) the appellant's principal business is to manufacture kitchen sinks (products) solely for export mainly in the United States. To manufacture the products, the appellant uses, amongst others, imported stainless-steel plates from Jiangmen XHHL Stainless Steel Manufacturing Co Ltd (Jiangmen XHHL), a company located in Guangdong, China. These stainless-steels plates were imported under the tariff code or harmonised system (HS) code of 7219.33.0000;

(ii) the appellant has a licensed (*ie*, bonded) warehouse (LW) under s. 65 of the Customs Act and a licensed (*ie*, bonded) manufacturing warehouse (LMW) under s. 65A of the Customs Act 1967;

(iii) as an LMW licensee, the appellant is automatically also a licensed warehouse (LW) under s. 65(1) of the Customs Act 1967 (LW licensee). The appellant is entitled to suspension/exemption on customs duties for the imported raw materials upon depositing the materials into its licensed (*ie*, bonded) warehouse;

(iv) under the definition of the words "licensed warehouse", "dutiable goods" and "customs duty" under s. 2(1) of the Customs Act 1967, this suspension/exemption from customs duties enjoyed by the appellant expressly includes suspension/exemption from anti-dumping duties. Accordingly, the appellant did not pay any anti-dumping duties on the imported stainless-steel plates;

(v) under an internal circular/letter dated 3 November 2016 (Customs circular), the Customs imposed a legal condition on all LMW licensees (including the appellant) that an LMW licensee does not enjoy suspension/exemption for anti-dumping duties;

(vi) the purported condition had been communicated to the appellant through the Customs' letter to the Federation of Malaysian Manufacturers (FMM) dated 9 January 2016 (letter to FMM);

(vii) it is a fact not disputed that:

(a) the Customs circular does not purport to impose any conditions on LMW licensees, but rather sets out Customs' interpretation of the law;

(b) the Customs circular was not written to the appellant, but to other Customs departments, and forwarded to the President of FMM by the letter to FMM issued some two years before the issuance of the LMW license to the appellant; and

(c) The LMW licence issued to the appellant neither contains this nor any similar condition, nor does it refer to the Customs circular/ letter to FMM.

(viii) on 2 December 2020 and 6 January 2021, the State Customs of Perlis conducted an audit on the appellant and found out that the appellant has underpaid anti-dumping duties at the rate of 23.95% for the importation of the stainless-steel plates from China for 2018 until December 2020 under the Anti-Dumping Duties Act and Schedule of Customs (Anti-Dumping Duties) Order 2018;

(ix) on 4 May 2021, a bill of demand (BOD) was issued to the appellant claiming the anti-dumping duties amounting to RM1,178,075.63;

(x) the appellant then filed an appeal to the tribunal number MOF.TRK.700-6/1/8(2021). On 7 November 2022, the appeal has been dismissed by the Tribunal; and

(xi) aggrieved by the decision of the Tribunal, the appellant filed this OS to challenge the same.

[5] The grounds in support of this application are as follows:

(i) The Tribunal committed errors of law by:

(a) failing to apply the Court of Appeal's decision in *Seruntun Maju Sdn Bhd v. Pengarah Kastam Negeri Perak Jabatan Kastam Diraja Malaysia & Anor* [2020] CLJU 925; [2020] 1 LNS 925; [2020] MLRAU 195; [2020] 6 MLJ 401 which held that the phrase 'specify in the licence' means 'to mention explicitly, definitely and certainly in the

licence'. Conditions must be unambiguously particularised and identified in the licence when the licence is granted or issued to the appellant and no conditions can be imposed after that.

(b) maintaining Customs' bill of demand dated 4 May 2021 which was issued based on a purported condition imposed on the appellant *via* Customs' internal letter dated 3 November 2016 and Customs' letter to FMM dated 9 December 2016 that licensed manufacturing warehouses do not enjoy exemption for anti-dumping duties; and

(c) failing to interpret s. 2(1), s. 65 and s. 65A of the Customs Act 1967 (Customs Act) correctly and wrongly decided that the appellant must pay the anti-dumping duties as the appellant did not obtain an exemption for anti-dumping duties imposed under the Countervailing and Anti-Dumping Duties Act 1993 (Anti-Dumping Duties Act).

(ii) the Tribunal failed to give any consideration or to give sufficient due consideration that:

(a) as a licensed warehouse and a licensed manufacturing warehouse under ss. 65 and 65A of the Customs Act, the appellant is entitled to enjoy suspension of all Customs duties imposed. The definition of customs duties includes anti-dumping duties imposed under the Anti-Dumping Duties Act;

(b) Customs is not empowered under the Customs Act or the Anti-Dumping Duties Act to restrict/limit the definition of customs duties;

(c) the purported condition imposed by Customs has never been specified in the relevant licences issued to the applicant under s. 65 and s. 65A of the Customs Act. In this regard, the purported condition does not fulfil the legal requirement 'to mention explicitly, definitely and certainly in the licence';

(d) the BOD was issued solely based on the custom's own interpretation and/or internal policy stated in the letters. The letters have no force of law and contradict with the express provisions in the Customs Act and the Anti-Dumping Duties Act; and

(e) the purported condition stated in the letters has never been sent by Customs to the appellant.

(iii) the Tribunal failed to decide that the appellant has a legitimate expectation that the Court of Appeal's decision in *Seruntum Maju* (*supra*) and the other express provisions would be adhered to and applied by Customs.

A **The Respondents' Submission**

[6] In gist, the respondents submit as follows:

(i) Anti-dumping duties are not suspended/exempted under the Customs Act. The prevailing law relating to anti-dumping duties is the B Anti-Dumping Duties Act, which does not provide for the suspension/ exemption of anti-dumping duties for LW and LMW. In this regard, s. 65 and s. 65A of the Customs Act are irrelevant;

(ii) there is no order under the Anti-Dumping Duties Act that suspends/ exempts the anti-dumping duties for LW and LMW. Any termination, C exemption, or suspension of anti-dumping duties imposed lies with the Minister of International Trade and Industry (MITI) and Minister of Finance (MOF);

(iii) relying on s. 30(5) of the Anti-Dumping Duties Act, the definition of "customs duty" under s. 2(1) of the Customs Act should be read D restrictively, only for the purposes of authorising Customs to collect anti-dumping duties;

(iv) according to para. 7 of the condition attached to the licences, which states that the appellant is not exempted from its obligations under other written law related to its business", the appellant is subject to the E Anti-Dumping Duties Act and not exempted from the anti-dumping duties on the imported stainless-steel plates; and

(v) it is a standard practice between Customs and FMM that the letter to FMM is sufficient notice, and it is the responsibility of FMM to F circulate the said letter to its members.

The Decision Of The Court

Appellant Enjoys Suspension/Exemption From Payment Of Anti-Dumping Duties

[7] This court is of the view that the Tribunal had erred in holding that G as an LMW licensee, the appellant does not enjoy suspension/exemption for anti-dumping duties.

[8] An LMW licensee (who also possesses an LW licence) enjoys customs duties suspension/exemption for goods deposited into its bonded warehouse under Customs Act, and under s. 34(1) of the Anti-Dumping Duties Act H which clearly provides that the Customs Act and Anti-Dumping Duties Act shall be construed as one.

[9] The Hansard of Dewan Rakyat Third Parliament's second session on 6 December 1972 clearly reflects the Parliament's intention to facilitate an LMW licensee to carry out manufacturing activities on imported goods I (raw material) that are not subject to customs duties in the LW.

[10] The then Finance Minister had stated as follows:

> At present, s. 65 of the Customs Act already provides for warehousing facilities. All goods imported into such licensed warehouses are not subject to customs duties until they are released from bond. The proposal now is to allow manufacturing activities to be carried on as well. To this extent, Customs facilities to be made available in such warehouses will be comparable to those obtainable in a free trade zone. The proposed Customs facility will not only provide a further incentive to the growth of export orientated industries, it will also encourage the dispersal of industries away from the major urban areas, thereby bringing employment opportunities to our people in the smaller towns and the rural areas.

[11] Therefore, it is clear the Parliament's intention in creating LMW licences is to encourage and incentivise export-oriented industries.

[12] It must be noted that all LMW licensees now automatically possess a LW licence as stated in s. 65A(1A) of the Customs Act. The appellant in the present appeal possessed both LMW licence and LW licence for years 2019 and 2020.

[13] Section 17A of the Interpretation Acts 1948 and 1967 (Consolidated and Revised 1989) provides that regard must be given to the purpose underlying the Act:

> Regard to be had to the purpose of Act
>
> 17A. In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the act or not) shall be preferred to a construction that would not promote that purpose or object.

[14] Therefore, it is my respectful view that the interpretation of the relevant provisions under the Customs Act must conform with Parliament's intention to incentivise and encourage export activities.

[15] Having read the definition of LW under s. (2)(1) of the Customs Act together with the meaning of "durable goods', it is clear that the appellant as a LW licensee is allowed to warehouse dutiable goods without paying the Customs duty first.

[16] Section 2(1) of the Customs Act defines LW as follows:

> "licensed warehouse" means a warehouse or other place licensed for the warehousing of dutiable goods under s. 65.

[17] "Dutiable goods' is further defined under s. 2 of the Customs Act as:

> "dutiable goods" means all goods subject to the payment of customs duty and on which such duty has not yet been paid.

[18] "Customs duty" is defined under s. 2(1) of the Customs Act to include "anti-dumping duty imposed by or under the Anti-Dumping Duties Act:

A **"Customs duty"** means any import duty, export duty, surtax surcharge or cess imposed by or under this Act, any **countervailing duty or anti-dumping duty imposed by or under the Countervailing and Anti-Dumping Duties Act 1993 [Act 504]**, any safeguard duty imposed by or under the Safeguards Act 2006 [Act 657] and includes any royalty payable in lieu of an export duty under any written law or a contract, lease or agreement to which the Federal Government or the Government of any State is a party or to which such Government has consented.

B (emphasis added)

[19] Further, reg. 50 of the repealed Customs Regulations 1977 which is applicable for the year 2019 and reg. 31(b) of the Customs Regulations 2019 which is applicable for the year 2020 provide that if customs duties had been paid, the taxpayer is no longer allowed to store the stainless-steel plates in its LW.

[20] Regulations 31(b) and 50 of the Customs Regulations 2019 read as follows:

D Duties of licensee under s. 65 of the Act

31. Any person who has been granted license to operate a warehouse under s. 65 of the Act:

(a) Shall ensure that the goods deposited are removed from the E warehouse within the period specified in the license;

(b) Shall not store any goods which customs duty has been paid, or not receive back into the warehouse any dutiable goods which have previously been removed, whether for export or otherwise, without obtaining the approval in writing from the proper officer of Customs.

F Regulation 31(b) of the Customs Regulations 2019, with effect from 1 January 2020 (applicable for year 2020)

The licensee shall not:

(a) Store on the licensed premises goods upon which the duty has been G paid; or

(b) Receive back into the licensed premises any dutiable goods which have previously been removed, whether for export or otherwise,

Without first obtaining the permission in writing of the proper officer.

H Regulation 50 of the Customs Regulations 1977 (applicable for 2019).

[21] I find that the customs duties suspension is consistent with and reflected in the following:

(i) the custom's website on licensed warehouse states that the payment of duty (duti) and taxes (cukai) for dutiable goods warehoused in LW is I deferred until the goods are released for home consumption or re-exported; and

(See: encl. 13 p. 64)

(ii) the MITI's website on LMW which states that raw materials and components warehouse in the LW, used directly in the manufacturing of approved goods are exempt from 'customs duty'.

(See: encl. 13 p. 67)

[22] Further, as an LMW licensee, the appellant also enjoys customs duties exemption under para. 2(1) and item 85 of the Schedule to the Customs Duties (Exemptions) Order 2017.

[23] Reading para. 2(1) and item 85 to the Schedule of the Customs Duties Exemption Order, it is clear that LW and LMW licensees are exempted from the payment of customs duty.

[24] Based on the foregoing, the legislations, including the Customs Act, Anti-Dumping Duties Act, Custom Duties Exemption Order, Customs Regulations 1977, and Customs Regulations 2019, clearly provide that the licences are entitled to suspension/exemption from customs duties, which extend to anti-dumping duties.

[25] Therefore, it is evident that the appellant as an LMW licensee enjoys suspension from customs duties under the Customs Act and exemption from customs duties under the Customs Duties Exemption Order.

Customs Cannot Amend The Express Suspension/Exemption Given By Legislation Through Letters

[26] The court is of the view that Customs is bound by all written laws. It cannot arbitrarily rewrite the law by its letters and disallow the appellant from the anti-dumping duties exemption from which it has been exempted by the MOF in the exercise of its statutory discretion.

[27] The Customs' attempt to remove anti-dumping duties from customs duties suspension/exemption entitled by LW and LMW is in clear breach of Parliament's intent as set out in the express language of s. 2(1) of the Customs Act.

[28] It must be noted that Parliament does not legislate in vain. Every word appearing in an Act must bear some meaning.

[29] The Federal Court in *Krishnadas Achutan Nair & Ors. v. Maniyam Sanykano* [1997] 1 CLJ 636; [1996] 2 MLRA 194; [1997] 1 AMR 997; [1997] 1 MLJ 94 held that:

> *The function of a court when construing an Act of Parliament is to interpret the statute in order to ascertain legislative intent primarily by reference to the words appearing in the particular enactment. Prima facie, every word appearing in an Act must bear some meaning. For Parliament does not legislate in vain by the use of meaningless words and phrases*. A judicial interpreter is therefore not entitled to disregard words used in a statute or subsidiary legislation or to treat them as superfluous or insignificant.
>
> (emphasis added)

[30] In *Ketua Pengarah Hasil Dalam Negeri v. Firgos (M) Sdn Bhd* [2014] 8 CLJ 943; [2013] MLRHU 876; [2014] 1 MLJ 701; [2014] 1 AMR 176, Zaleha Yusof J (as she then was) held that:

> [11] With due respect, I cannot agree with this line of submission. The words "Existing business" found before the words "in respect of manufacturing or processing of a product' must be read together as a whole, so that the expression "existing business in respect of manufacturing or expression of a product" is the more probable expression which is consistent with the intention of the Legislature in enacting para 8(a) of Schedule 7A. Refer to *Metacop Development v. Ketua Pengarah Hasil Dalam Negeri* (Judicial Review Application No. R2-25-389-2009). If Parliament had intended reinvestment allowance to be restricted only to "production area", then Parliament would have surely specified this clearly in Schedule 7 A. I agree with the respondent that by imposing the condition of "production area" to the meaning of "manufacturing", the appellant had clearly acted *ultra vires*, illegally and without jurisdiction as such was never the intention of Parliament. The appellant cannot be allowed to usurp the role of Parliament by coining its own definition of "manufacturing" and drafting its own law.
>
> (emphasis added)

[31] Further, in *Palm Oil Research And Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd* [2004] 2 CLJ 265; [2004] 1 MLRA 137; [2004] 4 AMR 202; [2005] 3 MLJ 97, the Federal Court held:

> [83] In my judgment s. 17A has no impact upon the well-established guidelines applied by courts from time immemorial when interpreting a taxing statute. Section 17A and these guidelines co-exist harmoniously for they operate in entirely different spheres when aiding a court in the exercise of its interpretive jurisdiction. *The correct approach to be adopted by a court when interpreting a taxing statute* is that set out in the advice of the Privy Council delivered by Lord Donovan in *Mangin v. Inland Revenue Commissioner* [1971] AC 739:
>
> First, *the words are to be given their ordinary meaning. They are not to be given some other meaning simply because their object is to frustrate legitimate tax avoidance devices*. As Turner J said in his (albeit dissenting) judgment in *Marx v. Inland Revenue Commissioner* [1970] NZLR 182 at 208, moral precepts are not applicable to the interpretation of revenue statutes.
>
> Secondly, ... *one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption so to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used*.' (Per Rowlatt J in *Cape Brandy Syndicate v. Inland Revenue Commissioners* [1921] 1 KB 64 at 71, approved by Viscount Simons LC in *Canadian Eagle Oil Co Ltd v. Regeim* [1945] 2 All ER 499, [1946] AC 119.
>
> Thirdly, *the object of the construction of a statute being to ascertain the will of the legislature, it may be presumed that neither injustice nor absurdity was intended. If therefore a literal interpretation would produce such a result, and the language admits of an interpretation which would avoid it, then such an interpretation may be adopted*.

Fourthly, *the history of an enactment and the reasons which led to its being passed may be used as an aid to its construction*.

(emphasis added)

[32] Further, it is clear from the Hansard that Parliament intended to suspend/exempt customs duties on all goods imported into LW and LMW so as to serve as an incentive for the growth of export-oriented industries.

[33] I am of the view if Parliament had intended to exclude anti-dumping duties from the exemption, it would have amended the definition of "customs duty" under s. 2(1) of the Customs Act to reflect such intention given that s. 2(1) of the Customs Act was in fact amended in the year 2006 by Customs (Amendment) Act 2006 to include safeguard duties.

[34] Based on the above, I find that the tribunal had made an error in holding that s. 2(1) of the Customs Act is irrelevant in ascertaining if the stainless-steel plates are suspended/exempt from anti-dumping duties given that:

(i) section 2(1) of the Customs Act clearly defines "custom duty" to include "anti-damping duty imposed by or under the Anti-Dumping Duties Act"; and

(ii) Customs' purported condition in its letters is inconsistent with Parliament's intention to establish an LMW facility to incentivise and encourage export-oriented industries.

[35] Therefore, it is clear that it is the Minister's prerogative to decide the scope of the customs duties exemption given to LW and LMW licensees under the Customs Duties Exemption Order, and not that of Customs.

[36] Evidently, the Customs Duties Exemption Order is enacted by the Minister in the exercise of its power conferred by Parliament under s. 14(1) of the Customs Act and the Customs Duties Exemption Order only comes into effect on 3 January 2018.

[37] The Federal Court in *Positive Vision Labuan Ltd v. Ketua Pengarah Hasil Dalam Negeri & Other Appeals* [2017] 9 CLJ 595; [2017] 2 MLRA 595; [2017] 2 MLJ 421 held that administrative policy cannot override legislation when it said as follows:

[122] As has been held by the Federal Court in the case of *Palm Oil Research and Development Board Malaysia* (*supra*), it is a well settled principle that a provision in a statute conferring power on a member of the Executive to enact subsidiary legislation, particularly one that imposes a financial levy or charges upon any section of the public, must be construed strictly. *Despite the legal improbability of a subsidiary legislation rising above that of its parent Act, hierarchical requirement demands that an administrative policy may not rise above a subsidiary legislation; that hierarchical requirement therefore must be safeguarded* (*Kerajaan Malaysia v. Wong Pot Heng & Anor* [1996] 2 MLRA 433; [1997] 1 MLJ 437; [1997] 2 CLJ 188; [1997] 1 AMR 850). Peh Swee Chin FCJ at p 437 in the latter case had occasion to state:

> *Any subsidiary legislation is in effect a transfer of power from Parliament to some other authority, eg, from the Administration with the executive authority of Malaysia vested in the Cabinet, down to any local authority. In order to protect the authority, dignity and standing of Parliament and at the same time, the man in the street, safeguard for such subsidiary legislation and courts are part of such safeguards.*
>
> (emphasis added)

[38] Based on the above, it is clearly the Minister who is empowered under the Customs Act to decide the type of customs duties qualified for exemption and there is no evidence that the Minister has delegated such power to Customs under the Delegation of Powers Act 1956.

[39] The Tribunal clearly committed an error of law in holding that the Customs could, by way of the Customs circular, impose a legal condition that overrides the statutory exemption given to LW and LMW licensees from anti-dumping duties.

Customs Circular And Letter To FMM Are Mere Internal Guidelines

[40] It is to be noted the Customs circular merely states that because the import duty exemption given to companies with LMW status is based on a Custom Duties Order, which was in effect then, the duties imposed under the Anti-Dumping Duties Act are, therefore, not exempted. The BOD was issued to the appellant on 27 January 2021 based on the Customs circular.

[41] Clearly, the Customs circular merely contains Customs' own interpretation of the relevant provisions. It does not purport to impose a "legal condition" on all LMW companies; the word "syarat" or "condition" appears nowhere in this letter.

[42] The Tribunal erred in law by holding that the Customs circular is a valid legal condition imposed by Customs on the appellant which restricts them from enjoying anti-dumping suspension/exemption. Further, I find that the letter, which the Customs relied on to impose the purported condition is not issued pursuant to any express provision of the Customs Act.

[43] The Customs further contends that this purported condition had been communicated to the appellant through the letter to FMM.

[44] I'm of the view that the letter to FMM is mere internal guidance to the Customs and internal ruling has no force of law.

[45] In *Multi-Purpose Holdings Berhad v. Ketua Pengarah Hasil Dalam Negeri* [2006] 1 CLJ 1121; [2006] 1 MLRA 40; [2006] 2 MLJ 498, the Court of Appeal held as follows:

> [13] Adopting the approach that commends itself, I am of opinion that the requirement of which the proviso speaks refers to a requirement imposed by law. So, it is incumbent on revenue to point to a written law which

requires an agreement such as the one in the present instance to have the approval of Government or an authority or committee appointed by the Government. Counsel for revenue frankly and correctly conceded that there is no such law. *There was a faint suggestion by counsel for revenue that the F1C Guidelines applied to this case. But, as my learned brother Arifin Zakaria JCA pointed out in response, the FIC Guidelines are not law*. See, *Ho Kok Cheong Sdn Bhd & Anor v. Lim Kay Tiong & Ors* [1979] 1 MLRA 173; [1979] 2 MLJ 224, where Wan Hamzah J said: *"The guidelines were issued not pursuant to any power given by law and in my opinion, they have no force of law ..."* .

(emphasis added)

[46] Further, on the same issue, I have decided in *Transocean Drilling Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2022] CLJU 2438; [2022] 1 LNS 2438; [2022] MLRHU 2089; [2022] MLJU 2541, as follows:

[44] In the instant case, I find that although the *Accompany Notes and Reminder to Form C for YAs 2011 and 2012 advised taxpayers to file their tax returns based on audited accounts, it was merely a best practice or a guide which had not been made mandatory by the ITA at the material time*.

[45] Furthermore, *it must be noted that a guideline and internal ruling by the IRB merely acts as a guideline and is not legally binding*.

(See: *Ketua Pengarah Hasil Dalam Negeri v. Success Electronics & Transformers Manufacturer Sdn Bhd* [2012] MSTC 30-039 and *Multi-Purpose Holdings Berhad v. Ketua Pengarah Hasil Dalam Negeri* [2006] 1 CLJ 1121; [2006] 1 MLR A 40; [2006] 2 MLJ 498)

(emphasis added)

[47] Given that the letters are mere internal guidelines and have no force of law, I am of the view that the Customs may not rely on the Customs' letters to impose the purported condition on the appellant.

The Letters Cannot Impose Legal Conditions On The Appellant

[48] It is to be noted that the BOD was issued by the Customs on the basis that the appellant had committed an offence under s. 133(1)(a) of the Customs Act.

[49] This court view that Customs cannot by way of a Customs circular/ a letter to FMM create a legal condition, the breach of which attracts a criminal sanction under s. 133(1)(a) of the Customs Act. Any finding to the contrary would create a dangerous implication that the Customs are empowered to play the role of a legislature and create conditions that would result in penal sanction.

[50] In *Transocean Drilling* (*supra*), I have decided that the Inland Revenue Board cannot create a criminal offence under s. 112(1) of the ITA for non-filing of a tax return through the use of accompanying notes and reminder in the tax return:

A [24] It is trite that a penal statute should be strictly construed in favour of the subject. Therefore, since s. 112(3) of the ITA being premised upon the commission of a criminal offence under s. 112(1) of the ITA and which imposes penalties, it should be strictly interpreted.

...

B [33] However, at paragraphs 10.8 - 10.14 of the Case Stated, the SCIT held that paragraph 2(B) of the Accompanying Notes (Nota Iringan) and the "Reminder" (Peringatan) in the Form C, which reminds taxpayer to compute taxes based on audited account, has imposed a legal requirement.

C [34] **The implication of this ruling is that the respondent could by the mere act of issuing Nota Iringan and "Peringatan", create a criminal offence under s. 112(1) of the ITA**.

[35] I am of the view that the SCIT erred in holding that the enactment of s. 77A(4) of the ITA was intended only to state clearly, the pre- existing
D legal requirement to file tax returns based on audited account.

(emphasis added)

[51] Further, I noted that neither the Customs circular nor the letter to FMM were addressed or sent to the appellant. In fact, the Tribunal's finding is inconsistent with oral evidence given by custom's own witness, who
E testified before the Tribunal that she is not sure whether the purported condition had ever been communicated to the appellant.

Q - Adakah puan setuju bahawa sebelum audit yang dibuat oleh pihak puan pada tahun 2020 ke atas Perayu, surat Kastam bertarikh 3 November 2016 dan 9 December 2016 ini tidak pernah dihantar
F secara terus kepada pihak Perayu?

A - Tidak pasti.

(See: encl. 7, pp. 2, 298 @ 2, 324: AIS of MCY, exh. MCY-28; notes of proceedings at tribunal dated 19 May 22)

G *The Purported Condition Is Not In The Licenses*

[52] Section 65(2) of the Customs Act for LW licence provides:

(2) Any such licence shall be for such period and subject to such **conditions as the Director General in each case may specify in the licence**.

H (emphasis added)

[53] Section 65A(2) of the Customs Act for LMW licence provides:

(2) Any such licence shall be for such period and subject to such **conditions as the Director General in each case may specify in the licence**.

(emphasis added)

I

[54] Based on the above sections, I am of the view that the Customs is required to specify the conditions applicable in the licence issued to the appellant and not in a separate document, whether the Customs circular or letter to FMM:

[55] I find support for my view by referring to the case of *Seruntum Maju* (*supra*) where the Court of Appeal considered s. 65D(2) of the Customs Act which is *pari materia* to ss. 65(2) and 65A(2) in present appeal.

[56] The Court of Appeal held that the phrase "specify in the licence" means "to mention explicitly, definitely and certainly in the licence" when the licence is issued when it held as follows:

> "[27] By reading 'specify in the licence' based on its natural meaning, it would naturally mean: *"to mention explicitly, definitely and certainly in the licence". In order words, no conditions can be imposed after the licence had been issued as this goes against the principle of stating it explicitly, definitely and certainly*.
>
> ...
>
> [36] The principles cited in the above authorities showed that *when a provision expressly provides that conditions shall be specified in the licence, it means that the conditions must be granted when the licence was issued. No conditions can be granted after that*.
>
> (emphasis added)

[57] Applying *Seruntum Maju* (*supra*) to the present appeal, I am of the view that the purported condition ought to be "mentioned explicitly, definitely and certainly in the licence and not through the Customs circular.

[58] I find that the present appeal is even worse than *Seruntum Maju* (*supra*) as the purported condition was not sent to the appellant but was addressed and circulated to a long list of Customs departments within Customs. In fact, the appellant only became aware of the Customs circular for the first time when it received Customs' notice of assessment dated 27 January 2021 which attached the Customs circular.

[59] Therefore, based on the above, I view that it was wrong for the Tribunal to hold that the purported condition in these letters had been validly imposed on the appellant, when the appellant was never informed of such purported condition at the time that the licences were issued and could not possibly have any prior knowledge of it.

[60] The Customs on the other hand relied on generic statements in the explanatory note of the appellant's LMW and LW licences and lampiran C, which is found on Customs' website, to contend that the letters, which contain the purported conditions, are issued pursuant to ss. 65(2) and 65A(2) and have been incorporated into the licences.

[61] However, I find that lampiran C can only be found on Customs' website, it is not issued or given to the appellant. Nothing in the lampiran C or the explanatory note of the LMW licence states that LMW licensees do not enjoy anti-dumping duties suspension/exemption.

(See: appellant's affidavit in support, exh. "MCY-11")

[62] Based on the principles that taxing legislations must be construed strictly and against the revenue in the Court of Appeal case of *Exxon Chemical (Malaysia) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2005] 4 CLJ 810; [2005] 2 MLRA 335 only conditions that are specified in the licences shall be applicable and the appellant shall not be subject to any other conditions that are not specified in the licences and be treated as committing a criminal offence for not complying with the purported conditions.

[63] Given that Customs cannot be allowed to create legal conditions that will result in criminal sanctions and considering that the purported legal condition is not contained "in" the licenses, it is clear that Customs' disallowance of the appellant's entitlement to suspension/exemption of anti-dumping duties is unreasonable, arbitrary and *ultra vires*.

Conclusion

[64] Premised on the aforesaid reasons, I am of the view that the Tribunal's decision is tainted with error of law, irrationality and/or unreasonableness that warrant the intervention of the court.

[65] The legislative intent of Parliament to suspend/exempt anti-dumping duties for LW and LMW licensees is clearly expressed in the legislations and the Hansard.

[66] The Customs, as an executive arm of the Government, and the Tribunal, as a quasi-judicial body, have a duty to uphold and give effect to the intention of Parliament. Any deviation from this duty undermines the integrity of the legislative process.

[67] As such, I allowed the appellant's OS (encl. 1) with costs of RM1,000 without the allocator fee.